No. 07-60

In the Supreme Court of the United States

SYLVESTRE ACOSTA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a police officer who falsified search warrants, participated in illegal searches, and stole personal property during the execution of the searches was properly convicted of depriving persons of their constitutional rights, in violation of 18 U.S.C. 242.

2. Whether the district court constructively amended the indictment when it instructed the jury that petitioner could be held liable on the charges against him based on the foreseeable actions of his co-conspirators taken in furtherance of the conspiracy.

3. Whether petitioner's convictions for using or carrying a firearm during and in relation to an eight-year conspiracy to violate civil rights, and using or carrying a firearm during and in relation to two distinct substantive civil rights violations during the time span of the conspiracy, violated his double jeopardy rights.

4. Whether the district court committed reversible plain error when it instructed the jury that, for purposes of 18 U.S.C. 242, the "use, attempted use, or threatened use of a dangerous weapon" means "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right," and "brandish[ing], display[ing], or referr[ing] to" the weapon.

5. Whether deprivation of rights involving the use, attempted use, or threatened use of a dangerous weapon in violation of 18 U.S.C. 242 is a crime of violence under 18 U.S.C. 924(c).

6. Whether conspiring to injure, oppress, threaten, or intimidate persons in the exercise or enjoyment of their constitutional rights in violation of 18 U.S.C. 241 constitutes a crime of violence under 18 U.S.C. 924(c).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 470 F.3d 132. The companion summary order of the court of appeals (Pet. App. 10-19) is not published in the *Federal Reporter* but is reprinted in 207 Fed. Appx. 39.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 2006. A petition for rehearing was denied on February 13, 2007 (Pet. App. 37-38). The petition for a writ of certiorari was filed on May 14, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of New York, petitioner was convicted of conspiracy to injure, threaten, or intimidate persons in their exercise of federally protected rights, in violation of 18 U.S.C. 241; deprivation of civil rights under color of law, in violation of 18 U.S.C. 242; and use of a firearm during and in relation to the commission of a crime of violence, in violation of 18 U.S.C. 924(c).[1] He was sentenced to imprisonment for 45 years and one day, to be followed by three years of supervised release. The court of appeals affirmed. Pet. App. 1-19.

1. Between 1989 and 2001, petitioner was a police officer assigned to various units combating drug traffic in the lower west side of Buffalo, New York. During that time, petitioner and other Buffalo narcotics officers entered into a scheme to steal money and property from suspects. They accomplished their objective by obtaining search warrants on the basis of false information, which they incorrectly attributed to reliable informants, and covering up the practice by falsifying fund disbursement forms to suggest that the informants had been paid for providing information when they had not actually done so. After executing the warrants, they stole money and property from the suspects and divided the stolen goods amongst themselves. Pet. App. 13; Gov't C.A. Br. 6-12.

During the execution of any search warrant, it was standard police procedure for the officers to have their weapons drawn and ready to fire. Pet. App. 14; Gov't C.A. Br. 11. On at least two occasions, members of the

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[1] All references to 18 U.S.C. 924(c) are to 18 U.S.C. 924(c) (2000 & Supp. IV 2004).

search t[illegible] fired their weapons during the execution of the searc[illegible] *Id.* at 15, 17, 38.

Petitioner's participation in the scheme was not limited to taking property after executing falsified search warrants. Petitioner and his co-conspirators threatened an informant by sticking a gun in his mouth and forcing him to provide additional leads for future drug raids during which they could steal additional money and property, and petitioner once stole money from a suspect during a traffic stop. Gov't C.A. Br. 12-13, 29.

2. Petitioner was indicted on one count of conspiracy to deprive individuals of their Fourth and Fourteenth Amendment rights, one misdemeanor and two felony counts of deprivation of civil rights under color of law, and three counts of using a firearm during and in relation to the commission of a crime of violence. The three firearm counts corresponded to the conspiracy count and the two felony counts of violation of 18 U.S.C. 242. Pet. App. 43-48. Petitioner was convicted on all counts. *Id.* 20-21.

3. On appeal, petitioner raised, among other challenges, several objections to his conviction for violation of 18 U.S.C. 242. First, petitioner contended (Pet. C.A. Br. 22-30) that the indictment was invalid because a police officer's unauthorized theft of private property does not, as the indictment charged, constitute a deprivation of due process of law. Second, petitioner claimed (*id.* at 30-39) that the district court had constructively amended the indictment by instructing the jury that petitioner could be found guilty of the charged substantive civil rights violations if the jury determined that any of his co-conspirators had engaged in those acts in furtherance of the conspiracy. See *Pinkerton* v. *United States*, 328 U.S. 640 (1946). Finally, petitioner argued

(Pet. C.A. Br. 43-47) that the district court erred when it instructed the jury that, for purposes of petitioner's 18 U.S.C. 242 charges, using, attempting to use, or threatening the use of a dangerous weapon means "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." 12/10/04 Trial Tr. 1625. Petitioner claimed that the instruction was inconsistent with this Court's interpretation of the term "use" as it is employed in 18 U.S.C. 924(c). See *Bailey* v. *United States*, 516 U.S. 137 (1995).

Petitioner also raised a number of objections to his firearm convictions under 18 U.S.C. 924(c), asserting that (1) his Section 924(c) conviction relating to the conspiracy charge was invalid on double jeopardy grounds, and (2) 18 U.S.C. 241 and are not crimes of violence that can support Section 924(c) charges. Pet. C.A. Br. 39-41, 47-61.

4. The court of appeals affirmed. Pet. App. 1-9, 10-19. In a published per curiam opinion (*id.* at 1-9), the court of appeals rejected petitioner's claims that 18 U.S.C. 241 and 242 are not crimes of violence within the meaning of 18 U.S.C. 924(c). Applying a categorical approach, see *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), the court concluded that petitioner's violation of 18 U.S.C. 242 qualifies as a crime of violence because he had been charged with, and the jury had found him guilty of, the felony version of that offense requiring "the use, attempted use, or threatened use of a dangerous weapon" in connection with the offense. Pet. App. 7. The court also concluded that 18 U.S.C. 241, which proscribes conspiracies that seek to "injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment" of a constitutional right, is an offense that, by its nature, "involves a substantial risk

that physical force will be used." Pet. App. 8 (internal quotation marks and citation omitted).

The court disposed of petitioner's remaining arguments in an unpublished order. Pet. App. 10-19. The court rejected petitioner's argument that the indictment did not properly allege violations of Section 242 based on a violation of the Fourteenth Amendment. *Id.* at 14-15. Applying plain-error review and relying on circuit precedent, the court held that officers violate the Fourteenth Amendment when they use their official positions to steal property from targets of their investigations. *Id.* at 15. The court further held that the indictment stated a violation of 18 U.S.C. 242 because it also alleged that petitioner deprived persons of their Fourth Amendment right to be free from illegal searches and seizures. Pet. App. 15.

The court also rejected petitioner's claim that the district court's *Pinkerton* charge constructively amended the indictment by allowing the jury to convict petitioner for the substantive crimes committed by his co-conspirators. The court reasoned that petitioner was charged with conspiring with others to violate persons' constitutional rights and actually depriving persons of their constitutional rights, and that the *Pinkerton* charge "did not subject [petitioner] to liability for any crime other than §242, it merely supplied another basis on which liability for this offense might be determined." Pet. App. 17. The court also noted that there was, in any event, sufficient evidence for the jury to convict the petitioner as a principal or aider and abettor. *Ibid.*

The court also rejected petitioner's claim, raised for the first time on appeal, that the district court's instructions concerning the meaning of the word "use" under 18 U.S.C. 242 were inconsistent with this Court's interpre-

tation of 18 U.S.C. 924(c) in *Bailey*, 516 U.S. 137. In finding the absence of plain error, the court explained that no authority exists for the proposition that the terms "use" under Sections 242 and 924(c) have the same meaning, and that, in any event, the district court's "use" instructions in the portion of the charge concerning Section 242 were consistent with its instructions concerning Section 924(c). Pet. App. 18.

The court rejected petitioner's argument, also raised for the first time on appeal, that he was subject to double jeopardy because he was convicted of violating 18 U.S.C. 924(c) for having used or carried a firearm during and in relation to his 18 U.S.C. 241 conspiracy conviction, as well as being convicted of separate Section 924(c) violations based on the 18 U.S.C. 242 substantive civil rights violations that occurred during the conspiracy. The court explained that the conspiracy charge encompassed broader conduct than just the two substantive civil rights offenses, and the jury could reasonably have found petitioner guilty for using a firearm during that broader conduct. Pet. App. 16-17.

ARGUMENT

1. Petitioner argues (Pet. 10-15) that the district court committed reversible error by instructing the jury that a police officer who steals private property under color of law has deprived his victim of property without due process of law in violation of the Fourteenth Amendment, and therefore may be found guilty of violating 18 U.S.C. 242. Petitioner contends that, under this Court's decision in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), the officer does not violate the Fourteenth Amendment unless and until the State provides or refuses to provide a remedy for

the victim's loss. Petitioner's argument does not warrant this Court's review.

a. As a threshold matter, review should be denied because petitioner's challenge to the jury instructions was neither pressed nor passed on below. In the court of appeals, petitioner invoked *Parratt* and *Hudson* only to argue that the indictment failed to state an actionable offense. Pet. C.A. Br. 22-29. That was the argument to which the government responded in its brief (Gov't C.A. Br. 41-45), and that was the argument the court of appeals addressed in its unpublished opinion (Pet. App. 14-15). Although petitioner mentioned the jury instructions in passing, he did not identify the adequacy of the instructions as a matter for the court of appeals to resolve. Pet. C.A. Br. 24-25. The issue therefore is not properly presented for this Court's review. See *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them."); accord *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

b. Even had petitioner raised the argument in the court of appeals, the claim would be reviewable only for plain error, as he made no objection in the district court. See Fed. R. Crim. P. 52(b); *United States* v. *Olano*, 507 U.S. 725, 732-733 (1993). Under the plain-error standard, petitioner would be entitled to relief only if he could show a clear or obvious error that both affected his substantial rights and seriously affected the fairness, integrity, or public reputation of the proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). Petitioner cannot satisfy that standard.

The district court committed no clear or obvious error when it instructed the jury that a police officer who

steals money or property under color of law violates the due process rights of his victims. The district court's instruction was consistent with the decisions of numerous courts of appeals that have upheld 18 U.S.C. 242 convictions for willful deprivation of due process rights in cases in which state officials stole money or property under color of law. See *United States* v. *Alonso*, 740 F.2d 862, 872-873 & n.8 (11th Cir. 1984), cert. denied, 469 U.S. 1166 (1985); *United States* v. *Albert*, 595 F.2d 283, 285 (5th Cir. 1979); *United States* v. *McClean*, 528 F.2d 1250, 1255-1256 (2d Cir. 1976). Petitioner can cite no criminal case in which a court of appeals has reached a contrary conclusion to that authority. Thus, even if *Parratt* and *Hudson* cast doubt on those cases, the district court did not commit "obvious" error. *Olano*, 507 U.S. at 734.

c. Petitioner would not be entitled to relief even if the jury instructions concerning the Fourteenth Amendment were clearly erroneous. Petitioner was charged with violating 18 U.S.C. 242 by depriving persons of rights guaranteed by the Fourth Amendment, as well as the Fourteenth Amendment. Petitioner does not dispute that, as the district court instructed the jury, a police officer acting under color of law violates the Fourth Amendment when he: (1) obtains a search warrant based on information he knows to be false; (2) seizes property without a warrant; or (3) seizes property "without legitimate law enforcement purpose." 12/10/04 Trial Tr. 1616. If the jury found a defendant guilty of taking money or property from an individual and converting it to his own use, in accordance with the judge's instructions on the procedural due process theory, *id.* at 1616-1618, then it also necessarily found that defendant guilty of seizing money or property "without legitimate law enforcement

purpose" under the Fourth Amendment instructions. And the evidence overwhelmingly established that petitioner's co-conspirators falsified warrants, knowingly executed illegal searches, and took suspects' property in furtherance of the conspiracy. As a member of the conspiracy, petitioner is liable for those acts under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). See pp. 9-10, *infra*. Petitioner thus cannot establish that any error with respect to the Fourteenth Amendment instructions affected his substantial rights or seriously affected the fairness of the proceedings. Cf. *Johnson*, 520 U.S. at 467; *United States* v. *Cotton*, 535 U.S. 625, 633 (2002).

d. Petitioner argues in the alternative that he had no "fair warning" of the range of conduct forbidden by 18 U.S.C. 242, and thus should be accorded "good faith immunity" from prosecution. Pet. 15 (citing *United States* v. *Lanier*, 520 U.S. 259, 270 (1997)). Petitioner's argument lacks merit. It is clearly established that searching suspects on the basis of false warrants and stealing property from them violates the suspects' constitutional rights, and petitioner thus had fair warning that his conduct subjected him to liability under 18 U.S.C. 242. See *Lanier*, 520 U.S. at 270.

2. Petitioner argues (Pet. 15-20) that the district court constructively amended the indictment by instructing jurors (12/10/04 Trial Tr. 1640-1641) that he could be held responsible for the substantive civil rights violations committed by his co-conspirators if those crimes were reasonably foreseeable consequences of acts committed in furtherance of the conspiracy. See *Pinkerton*, 328 U.S. 640. The court of appeals correctly concluded that the *Pinkerton* charge did not constructively amend the indictment, and its unpublished ruling

does not conflict with any decision of this Court or of any other court of appeals. This Court's review of this issue is therefore not warranted.

As the court of appeals noted (Pet. App. 17), the indictment clearly charged petitioner with both substantive violations of 18 U.S.C. 242 and conspiracy to deprive individuals of constitutional rights under 18 U.S.C. 241. See Pet. App. 43-47. And, as the court of appeals correctly concluded, "[t]he *Pinkerton* charge did not subject [petitioner] to liability for any crime other than § 242, it merely supplied another basis on which liability for this offense might be determined." *Id.* at 17. The courts of appeals have uniformly agreed that *Pinkerton* liability need not be charged in the indictment before the jury may receive a *Pinkerton* instruction, as an indictment need not "contain the specific theory of law which the prosecution intends to use in its attempt to convict the defendant." *United States* v. *Galiffa*, 734 F.2d 306, 314 (7th Cir. 1984); see *United States* v. *Washington*, 106 F.3d 983, 1011 (D.C. Cir.), cert. denied, 522 U.S. 984 (1997); *United States* v. *Thirion*, 813 F.2d 146, 152 (8th Cir. 1987); *United States* v. *Roselli*, 432 F.2d 879, 894-895 & n.27 (9th Cir. 1970), cert. denied, 401 U.S. 924 (1971).

Contrary to petitioner's assertion (Pet. 18-20), the court of appeals' decision creates no conflict with *United States* v. *Pedigo*, 12 F.3d 618 (7th Cir. 1993). In *Pedigo*, the defendant was charged with (1) one count of possession of marijuana with intent to distribute; (2) knowingly using a firearm during and in relation to that substantive offense; and (3) conspiring with others to distribute marijuana. Even though the indictment, on its face, permitted conviction on the firearm charge only upon a finding that a firearm was used during and in relation to

the *substantive offense*, the district court nevertheless instructed the jury that the defendant could be found liable on the firearm charge if his co-conspirator used a firearm in furtherance of the *conspiracy*. The Seventh Circuit held that this was error. *Id.* at 631. In this case, by contrast, the *Pinkerton* charge directly tracked the substantive offenses and conspiracy charge contained in the indictment.

In any event, the question is of limited significance in this case, since, as the court of appeals held, "there was sufficient evidence to support a rational jury finding that [petitioner] himself engaged in the criminal violation of civil rights under § 242." Pet. App. 17.

3. Petitioner contends (Pet. 20-21) that his conviction for using or carrying a firearm during or in relation to the conspiracy to deprive persons of their constitutional rights may have been duplicative of his convictions for using or carrying a firearm during or in relation to the two substantive rights violations, and should therefore have been dismissed on double jeopardy grounds. Petitioner's argument is without merit.

Petitioner did not preserve his objection before the district court, nor did he request a jury instruction that would limit the jury's consideration of the conduct that would support the firearms conviction he now challenges. Pet. App. 16. As the court of appeals correctly held, the district court committed no reversible error. *Ibid.* As the court of appeals observed, "the conspiracy involved broader conduct than the substantive [Section 242] offenses]." *Id.* at 16-17. The jury heard evidence that petitioner joined in a conspiracy to deprive persons of their civil rights over several years, including incidents that did not form the basis for the substantive violations, during which firearms were used. The court

of appeals correctly concluded that the jury "could have reasonably convicted on this conduct." *Id.* at 17.

4. Petitioner asserts (Pet. 21-23) that the district court committed reversible plain error when it instructed the jury that the "use, attempted use or threatened use of a dangerous weapon" within the meaning of 18 U.S.C. 242 encompasses "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." 12/10/04 Trial Tr. 1625. Petitioner contends that this instruction is inconsistent with this Court's holding in *Bailey*, 516 U.S. 137. The court of appeals correctly rejected that contention in its unpublished opinion, and its judgment does not warrant further review.

As the court of appeals noted (Pet. App. 18), the district court's instruction concerning the "use" of a weapon under Section 242 did not end with "having the dangerous weapon available to assist or aid in the commission of the act of depriving a constitutional right." The district court further instructed the jury that it should find this element of the offense satisfied "if the dangerous weapon was brandished, displayed, or referred to by the defendant so that the others present knew that the weapon was available if needed during the commission of the deprivation of a constitutional right." 12/10/04 Trial Tr. 1626.

Considering the meaning of the statutory term "use" for purposes of 18 U.S.C. 924(c), this Court held in *Bailey* that "use" "requires evidence sufficient to show an *active employment* of the firearm by the defendant." 516 U.S. at 143. But the Court further noted that "[t]he active-employment understanding of 'use' certainly includes *brandishing*, *displaying*, bartering, striking with, and, most obviously, firing or attempting to fire a fire-

arm. * * * [A] *reference to a firearm* calculated to bring about a change in the circumstances of the predicate offense is a 'use,' just as the silent but obvious and forceful presence of a gun on a table can be a 'use.'" *Id.* at 148 (emphasis added).

Assuming the term "use" carries the same meaning in 18 U.S.C. 242 as it does in 18 U.S.C. 924(c), the district court's instructions, taken as a whole, are consistent with *Bailey*'s "active employment" definition of "use." Under *Bailey*, brandishing, displaying, and referring to a firearm are all "uses" within the meaning of the statute. The district court did not err when it so instructed the jury.

5. Finally, petitioner contends (Pet. 23-30) that neither a deprivation of rights under color of law (18 U.S.C. 242) nor a conspiracy to deprive a person of rights (18 U.S.C. 241) can qualify as a predicate "crime of violence" for a conviction under 18 U.S.C. 924(c). The court below correctly rejected that contention, and its ruling does not conflict with any decision of this Court or of any other court of appeals. This Court's review of the issue is therefore not warranted.

Section 924(c) proscribes using or carrying a firearm "during and in relation to any crime of violence." 18 U.S.C. 924(c)(1)(A). The statute defines "crime of violence" as a felony that (1) "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or (2) "that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3).

a. Section 242 makes it an offense punishable by not more than one year in prison when any person under

color of law willfully deprives a person of his constitutional or statutory rights. The following clause of the provision further provides that, if "bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire," the defendant shall be fined, imprisoned for a term of not more than ten years, or both. 18 U.S.C. 242.

Petitioner claims (Pet. 27-28) that the additional elements described in the second clause of 18 U.S.C. 242 do not render the offense a "crime of violence" because "bodily injury" may result even without the use of force. Petitioner, however, was not charged with acts resulting in bodily injury. The indictment specifically charged petitioner with willfully stealing property "through the use, attempted use, and threatened use of a dangerous weapon." Pet. App. 44-45. The jury was instructed that the government was required to prove beyond a reasonable doubt that petitioner "used, or attempted to use, or threatened to use the use of a dangerous weapon." 12/10/04 Trial Tr. 1625. And the jury indicated on the verdict form that it found petitioner guilty "on the offense of deprivation of civil rights under color of law through use of a dangerous weapon." Jury Verdict Form 2-3.

As the court of appeals correctly concluded (Pet. App. 7-8), where, as here, a defendant is charged with violating 18 U.S.C. 242 through "the use, attempted use, or threatened use of a dangerous weapon," 18 U.S.C. 242, the offense includes as an element "the use, attempted use, or threatened use of physical force," 18 U.S.C. 924(c)(3)(A). In those circumstances, the Section 242 violation constitutes a predicate "crime of violence" for Section 924(c) charges. The only other court of ap-

peals to have considered the issue has reached the same conclusion. *United States* v. *Williams*, 343 F.3d 423, 434 (5th Cir.), cert. denied, 540 U.S. 1093 (2003).

b. The court of appeals also correctly concluded that a conspiracy to deprive citizens of their civil rights in violation of 18 U.S.C. 241 qualifies as a predicate "crime of violence" for purposes of 18 U.S.C. 924(c) charges. Section 241 proscribes conspiring "to injure, oppress, threaten, or intimidate" a person in the "free exercise or enjoyment" of any federal right or privilege.

Petitioner asserts (Pet. 25-26) that because a person may violate Section 241 without using force, it cannot be a "crime of violence" for purposes of Section 924(c). Petitioner supports its contention by identifying cases from this Court in which Section 241 (or its precursor) was violated without use of physical force violence. Pet. 25-26. This argument, however, ignores the plain language of Section 924(c), which identifies crimes of violence as those that, by their nature, involve "a *substantial* risk" that physical force may be used, not a guaranteed risk. 18 U.S.C. 924(c)(3)(B) (emphasis added). As the court of appeals explained (Pet. App. 8), because "applying physical force is perhaps the most obvious way to injure, threaten, or intimidate, a conspiracy to engage in such conduct is, by its nature, a conspiracy that involves a 'substantial risk that physical force' will be used." The only other court of appeals to consider the issue reached the same conclusion. *United States* v. *Greer*, 939 F.2d 1076, 1099 (5th Cir. 1991), cert. denied, 507 U.S. 962 (1993).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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